IN THE HIGH COURT OF JUDICATURE AT BOMBAY

O.O.C.J.

WRIT PETITION NO. 2846 OF 2002

Rasik Govind Mankar .....Petitioners.

vs.

The Oberoi Towers ....Respondents.

A.D. Shetty for the petitioner.

M.M. Varma i/by. Rajesh Gehani for the respondents.

CORAM: S.U. KAMDAR, J.

DATED 19TH APRIL, 2006.

JUDGMENT :

1. The present writ petition is filed challenging the impugned order and judgment dated 7.8.2002 in Revision Application (ULP) No. 143 of 2001. Some of the material facts of the present case are as under :

2. The petitioner was an employee with the respondent no.1 since 1.4.1982. The petitioner joined the services as a utility worker in Kitchen Stewarding department bearing Clock No. 1858. The petitioners last drawn up wages was Rs.8600/- per month. It is the case of the petitioner that during the period 15.10.1996 to 12.1.1997 the petitioner was suffering from mental depression and was under mental treatment and thus could not report on duty and he resumed the duty only on 12.1.1997. He produced the fitness certificate dated 15.4.1997 after resuming the duty on 12.1.1997. Thus the petitioner was absent from duty for a period of 89 days. Accordingly the respondent issued a chargesheet on 12.1.1997 charging the petitioner with a misconduct as specified in standing order which inter-alia provided "absence without leave for more than 10 consecutive days" The petitioner filed a reply on 31.5.1997 to the said chargesheet and ultimately a domestic inquiry was conducted against the petitioner. After conducting the domestic inquiry an inquiry report was made and inquiry officer

ultimately recommended by his report dated 4.8.1998 that the petitioner should be dismissed from service. After the report is made a show cause notice is issued on 31.5.1996 by the disciplinary authorities forwarding the findings of the inquiry officer and seeking reply of the petitioner thereof. The petitioner replies to the said show cause notice on 5.9.1998 and ultimately the disciplinary authority by an order dated 24.9.1998 dismissed the petitioner from the service.

3. Being aggrieved by the said order the petitioner moved a complaint under the provisions of Section 28 of the MRTU and PULP Act being Complaint (ULP) no. 587 of 1998 against the respondent alleging unfair labour practice under Items 1(a), 1(b), (d), (e), (f) and (g) of Schedule IV of the MRTU and PULP Act and inter-lia prayed that the petitioner should be reinstated with continuity of service and full back wages and should be given other benefits by setting aside the order of dismissal. The respondent replied to

the said complaint and after the reply is filed a preliminary issued was framed i.e. whether the inquiry conducted by the respondent employer was fair and proper inquiry or it was in breach of the principles of natural justice or that the said findings are perverse. By an order dated 11.7.2000 the Vth Labour court held that the inquiry against the petitioner was just, legal and proper and the finding drawn by the Inquiry Officer are not perverse. The said order of the Labour court on preliminary issue dated 11.7.2000 was not challenged by the petitioner and thus the Labour Court thereafter proceeded further with the hearing of the said complaint. After hearing the parties the Labour Court upheld the dismissal order of the petitioner by an order dated 19.7.2001 and dismissed the complaint of the petitioner herein.

4. Being aggrieved by an order of the 5th Labour Court a Revision Application is filed being Revision Application (ULP) No. 143 of 2001 before the Industrial Court, Maharashtra under Section 44

of the MRTU and PULP Act, 1971 and by an order and judgment dated 8.7.2002 the said Revision Application has been rejected by the Industrial Court. It is this order of the Industrial court dismissing the Revision Application the present petition is filed. Learned counsel appearing for the petitioner has contended before me two fold submissions.

5. Firstly it has been contended that though it is an admitted position that the petitioner was not on duty for a period of 89 days but on the basis of the evidence and material on record the petitioner is able to justify such absence from duty and therefore the petitioner could not have been charged with punishment for such absenteeism from duty. Learned counsel for the petitioner has contended that once there is a justification for remaining absent from the duty then the petitioner could not be punished. In support of the aforesaid contention he has drawn my attention that the petitioner was sick and suffering from mental depression. He has thus remained absent

for 89 days. He has also drawn my attention to the document which are filed in the form of compilation to show that on occasion during the said period of 89 days he had visited the office premises of the hotel and met one Mr. Bindra. It has been further contended that in the said meeting with Mr. Bindra he pointed out that he is unable to attend the office due to his mental depression condition and that Mr. Bindra orally authorised the said leave. Alternatively he has contended that assuming that there is a charge proved of 89 days absenteeism then the punishment awarded of dismissal is disproportionate to the charge levelled and therefore the said punishment must be reduced and the petitioner should be reinstated in service and if necessary, with the reduction in back wages so that the petitioners employment can be protected.

6. Learned counsel for the respondent has on the other hand contended that on the evidence and material produced before the authority the charge of habitually remaining absent for more than 10

days has been proved. There is sufficient evidence and material produced before the authorities. He has thereafter submitted that the contention of the learned counsel for the petitioner that there was oral authorisation obtained from Mr. Bindra is baseless and without any merits. He has drawn my attention to the compilation which contain some leave application and pointed out that infact during the period of 89 days one or two days leave was obtained. While dealing with the argument of disproportionate punishment he has drawn my attention to the past record of the petitioner with the company and pointed out that the petitioner has been in habit of remaining absent from time to time. He has pointed out that even earlier during the period of 1990-91 also the petitioner was absent for a longer period of time. Not only that he was also punished by imposing punishment of warning. He has drawn my attention to Exhibit C 3 before the court which indicated that there was a memo issued on 25.9.1992 for remaining unauthorisedly absent from 14.9.1992. He has also pointed out that

infact the chargesheet was issued on 3.7.1992 and consequently warning memo was given on 1.8.1992 in pursuance of the said charges. He has further pointed out that even earlier a warning was given on 28.8.1991 for remaining unauthorisedly absent. He has pointed out that the petitioners past record do not justify any lenient punishment for his habitual absenteeism and thus his punishment should not be reduced by this court in exercise of writ jurisdiction. He has further submitted that this court's jurisdiction under Article 226 is limited and the court cannot go in appreciation or reappreciation of the evidence laid before the authorities and come to a different conclusion. He has thus submitted that the petition should be dismissed.

7. I have considered the aforesaid contention of the petitioner of disproportionate punishment. Insupport of the aforesaid contention he has relied upon the division bench judgment of this court in the case of **Richardson and Cruddas (Ltd) vs. Association of Engineering Workers and Ors**

reported in 1996 I CLR 1079 particularly para 10 which reads as under :

> "10. The Labour court has found that the charge levied by the management stood proved and the employee has also admitted the guilt. The inquiry was held to be fair. However, the Labour Court found that the misconduct alleged did not warrant punishment of dismissal from service, and in these circumstances he order reinstatement with continuity in service and 50% backwages. The workman has been given punishment for the misconduct attributed to him. He has been reinstated in service with 50% backwages and that this punishment is commensurate with the accusation levied against the workman. The learned counsel for the workman invited out attention to the judgment reported in Gujarat Steel Tubes Ltd v. Its Mazdoor Sabha 1980 LIC 1004 to contend that the normal rule is that while reinstating the workman in service he should be given full backwages and in the given case where the full backwages are not to be allowed, the circumstances necessitating the departure must be established by the employer. The submission of the learned counsel is not well founded. The Labour court has not found that the charge levied against the workman was not established. He found hat the charge has been established. But he interfered with the order of the employer only on the quantum of punishment. The Labour Court found that the punishment of dismissal from service in the case was shockingly disproportionate to the charge levied against the workman and it was under these circumstances that he ordered reinstatement with the continuity in service and 50% backwages. Disallowing of 50% backwages appears to be the punishment

> imposed by the Labour Court which it thought under the circumstances would meet the end of justice. The Labour disallowed 50% of the backwages by way of punishment and we do not think that the imposition of this punishment is not warranted on the proved facts of the case.

8. It is an admitted position that the petitioner has been absent for a period of 89 days. It is also an admitted position that the said absenteeism is unauthorised and there was no prior leave taken. The purported contention that the said absenteeism was on the basis of oral authorisation of Mr. Bindra has not been established. The respondent has led the evidence of two witnesses before the Inquiry officer who has produced the record and deposed that the petitioner has taken no permission from any person for obtaining leave with authorisation. The authorities have also produced the record to show that infact no authorisation was given of any leave to the petitioner herein except one or two days specifically in writing. In any event I am of the opinion that it is not possible for me to reconsider and reappreciate the entire evidence to

accept the contention of the petitioner that there is an oral authorisation by one officer and thus his leave was an authorised leave. The company has been maintaining the record of authorisation given inrespect of the leave period. Admittedly there are no documents to show that any such authorisation in normal course of business was given to the petitioner herein and therefore I am not inclined to accept the contention of the learned counsel for the petitioner that the leave was an authorised leave. In so far his contention that there is a justification for granting the leave is concerned I am of the opinion that the said contention is baseless and without any merits. It is not in dispute that the so called medical certificate relied upon and produced are all certificates which are obtained after he resumed the job to show his fitness. There are no the medical certificates which are produced during the course of the period when he was on leave to show that he was infact suffering during that period from any such disease or mental depression. The subsequent certificate produced almost after a

period of more than a month by the petitioner to indicate his fitness cannot be a ground or justification for remaining absent for 89 days. Inthat view of the matter the so called justification relied upon has no basis whatsoever either on the ground that the leave is authorised or on the ground that he was medically unfit. Accordingly the aforesaid contentions of the learned counsel are required to be rejected.

9. Now turning to the contention about disproportionate punishment I am of the opinion that the judgment cited by the learned counsel for the petitioner in the case of Richardson Crudddas (supra) has no application whatsoever on the facts of the present case. That was a case where the court felt that the exercise of jurisdiction by the Industrial court under Section 11A on the facts of that case should not be interfered with by the court. In a recent judgment of the apex court in the case of **Ram Saran vs. I.G. of Police, CRPF and Ors. reported in 2006 (2) AIR Bom R 386** wherein in paras 7 and 8 the apex court

has held as under :

> "7. Therefore, in case of removal from service, the entitlement of pension is statutorily taken away. The only other plea advanced by learned counsel for the appellant seems the completion of 27 years of service. It was pointed out that the punishment was disproportionate to the alleged infraction.
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> 8. The courts should not interfere with the administrator's decision unless it was illogical or suffers from procedural impropriety or was shocking to the conscience of the court, in the sense that it was in defiance of logic or moral standards. In view of what has been stated in (CA) Associated Provincial Picture House Ltd vs. Wednesday Corpn. (1948) l KB 223: (1947) 2 ALL ER 680 (CA) commonly known as Wednesday's case the court would not go into the correctness of the choice made by the administrator open to him and the court should not substitute its decision to that of the administrator. The scope of judicial review of limited to the deficiency in decision making process and not the decision."

Similar view has been taken by Supreme Court in an unreported judgment dated 11.11.2005 in the case of **Union of India and Ors. vs. Datta Linga Toshatwad in Civil Appeal No. 6785 of 2005,** wherein the court has held that the court should

not interfere with the punishment imposed by the authority merely because it is harsh. It must be shockingly disproportionate. In the present case the record of the petitioner indicates that he has been habitually remaining absent. Even earlier warnings and memos were given to the petitioner but inspite of the same he has remained absent from the job. The standing order 25 contemplates only four kinds of punishment.

(i) warned or censured, or

(ii) fined subject to and in accordance with the provisions of the Payment of Wages Act, 1936 or

(iii) suspended by an order in writing signed by the Manager for a period not exceeding four days, or

(iv) dismissed without notice.

10. In the present case the petitioner has already been warned in past and memos are issued. Inspite of the same he continues to be an habitual offender by continuously remaining absent. In the aforesaid light of the fact the awarding of penalty of dismissal cannot be treated as disproportionate or shocking the conscience of the court. The punishment prescribed under standing Order 25 itself suggest that the dismissal is the only available punishment after issuing notices and warnings. In the present case I do not feel that the punishment prescribed under Standing Order 25 (b) and (c) is justified keeping in mind the past record of the petitioner herein. In my opinion neither the respondent has erred in awarding the penalty of dismissal to the petitioner nor the authorities have erred by refusing to interfere with the punishment awarded by the respondent herein. The present is the case of the concurrent findings of facts that the petitioner is guilty of habitual absenteeism and

that the punishment awarded is disproportionate to the charges levelled against the petitioner herein. In my opinion no case is made out for interfering with the impugned order passed by the labour court or an error in revision by the Industrial court and therefore the petition must fail. Accordingly the petition is dismissed. However no order as to costs.

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